

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of:	)	
	)	
Cable One, Inc.	)	CSR-6846-A
	)	
Petition For Modification of the Tulsa, Oklahoma DMA	)	
	)	CSR-6711-N
Cable One, Inc.	)	
	)	
Petition For Waiver of Section 76.92(f) of the Commission's rules	)	
	)	CSC-395
Nexstar Broadcasting, Inc.	)	
	)	
Complaint for Enforcement and Request for Sanctions	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: September 30, 2005**

**Released: October 11, 2005**

By the Deputy Chief, Media Bureau:

**I. INTRODUCTION**

1. Cable One, Inc. ("Cable One") filed the above-captioned petition for special relief seeking to modify the Tulsa, Oklahoma designated market area with respect to television broadcast station KJRH (NBC, Ch. 2), Tulsa, Oklahoma ("KJRH"). Specifically, Cable One requests that its system communities of Miami, Commerce, North Miami and Ottawa County, Oklahoma, be included within KJRH's market for purposes of the cable television mandatory broadcast signal carriage rules. Oppositions to this petition were filed on behalf of Nexstar Broadcasting, Inc., licensee of television broadcast station KSNF (NBC, Ch. 16), Joplin, Missouri ("KSNF") and Saga Quad States Communications LLC, licensee of station KOAM-TV (CBS, Ch. 7), Pittsburg, Kansas ("KOAM-TV") to which Cable One replied. Cable One also filed a petition seeking waiver of the network nonduplication rules so that its subscribers could continue to receive uninterrupted carriage of KJRH's network programming. An opposition to this petition was filed on behalf of KSNF to which Cable One replied. Finally, KSNF filed an order to show cause, alleging that Cable One has failed to provide KSNF with network nonduplication protection as required by Section 76.92 of the Commission's rules. An opposition to the petition was filed on behalf of Cable One to which KSNF replied. Because the issues in these petitions are related, they will be decided together.

## II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act and the rules adopted by the Commission in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992* (“*Must Carry Order*”), commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station’s market.<sup>1</sup> A station’s market for this purpose is its “designated market area,” or DMA, as defined by Nielsen Media Research.<sup>2</sup> A DMA is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.<sup>3</sup>

3. Under the Act, however, the Commission is also directed to consider changes in market areas. Section 614(h)(1)(C) provides that the Commission may:

with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station’s television market to better effectuate the purposes of this section.<sup>4</sup>

In considering such requests, the 1992 Cable Act provides that:

the Commission shall afford particular attention to the value of localism by taking into account such factors as –

(I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;

(II) whether the television station provides coverage or other local service to such community;

(III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community;

(IV) evidence of viewing patterns in cable and noncable households within

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<sup>1</sup>8 FCC Rcd 2965, 2976-2977 (1993).

<sup>2</sup>Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station’s market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. *See* 47 U.S.C. §534(h)(1)(C). Section 76.55(e) requires that a commercial broadcast television station’s market be defined by Nielsen Media Research’s DMAs. *See Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, 14 FCC Rcd 8366 (1999) (“*Modification Final Report and Order*”).

<sup>3</sup>For a more complete description of how counties are allocated, *see* Nielsen Media Research’s *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

<sup>4</sup>47 U.S.C. §534(h)(1)(C).

the areas served by the cable system or systems in such community.<sup>5</sup>

The legislative history of the provision states that:

where the presumption in favor of [DMA] carriage would result in cable subscribers losing access to local stations because they are outside the [DMA] in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the areas which they serve and which form their economic market.

\* \* \* \*

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.<sup>6</sup>

In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.<sup>7</sup>

4. In the *Modification Final Report and Order*, the Commission, in an effort to promote administrative efficiency, adopted a standardized evidence approach for modification petitions that requires the following evidence be submitted:

(1) A map or maps illustrating the relevant community locations and geographic features, station transmitter sites, cable system headend locations, terrain features that would affect station reception, mileage between the community and the television station transmitter site, transportation routes and any other evidence contributing to the scope of the market.

(2) Grade B contour maps delineating the station's technical service area and showing the location of the cable system headends and communities in relating to the service areas.

Note to paragraph [2]: Service area maps using Longley-Rice (version 1.2.2) propagation curves may also be included to support a technical service exhibit.<sup>8</sup>

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<sup>5</sup>*Id.*

<sup>6</sup>H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

<sup>7</sup>*Must Carry Order*, 8 FCC Rcd at 2977 n. 139.

<sup>8</sup>The Longley-Rice model provides a more accurate representation of a station's technical coverage area because it takes into account such factors as mountains and valleys that are not specifically reflected in a traditional Grade B  
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- (3) Available data on shopping and labor patterns in the local market.
- (4) Television station programming information derived from station logs or the local edition of the television guide.
- (5) Cable system channel line-up cards or other exhibits establishing historic carriage, such as television guide listings.
- (6) Published audience data for the relevant station showing its average all day audience (i.e., the reported audience averaged over Sunday-Saturday, 7 a.m.-1 a.m., or an equivalent time period) for both cable and noncable households or other specific audience indicia, such as station advertising and sales data or viewer contribution records.<sup>9</sup>

Petitions for special relief to modify television markets that do not include the above evidence shall be dismissed without prejudice and may be re-filed at a later date with the appropriate filing fee. The *Modification Final Report and Order* provides that parties may continue to submit whatever additional evidence they deem appropriate and relevant.

### III. DISCUSSION

#### A. Market Modification

5. The issue before us is whether to grant Cable One's request to include its cable communities within the market of KJRH. All of the communities at issue are located in the Joplin-Pittsburg, Missouri DMA while KJRH is licensed to Tulsa, Oklahoma and is located in the Tulsa DMA. Considering all of the relevant factual circumstances in the record, we believe that the market modification petition is a legitimate request to redraw DMA boundaries to make them congruous with market realities.

6. The first statutory factor we must consider is "whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community."<sup>10</sup> Cable One states that it currently carries KJRH and has done so for nearly 40 years.<sup>11</sup> Cable One argues that this continuous, voluntary carriage of KJRH is strong evidence that KJRH's natural market includes the subject communities, particularly given the copyright royalty costs incurred in carrying the station.<sup>12</sup> Moreover, Cable One states that its subscribers consider KJRH a local station.<sup>13</sup>

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contour analysis. In situations involving mountainous terrain or other unusual geographical features, Longley-Rice propagation studies can aid in determining whether or not a television station actually provides local service to a community under factor two of the market modification test.

<sup>9</sup>47 C.F.R. §76.59(b).

<sup>10</sup>47 U.S.C. § 534(h)(1)(C).

<sup>11</sup>Modification at Exhibit A. Cable One notes that it also carries three other Tulsa stations – KOED-TV, KOTV and KTUL.

<sup>12</sup>*Id.* at 3.

Cable One points out that KJRH has also been historically carried on nearby cable systems.<sup>14</sup> KSNF does not dispute that KJRH has historically been carried on Cable One's systems.<sup>15</sup> However, KSNF argues, historic carriage by itself does not demonstrate that a change in DMA boundaries is warranted. Moreover, KSNF states, all of the nearby cable communities that Cable One cites as receiving KJRH are located in counties within the Tulsa DMA.<sup>16</sup> Cable One argues that it is uncontested that: a) KJRH has continuous historic carriage; b) that the system carries others stations licensed to Tulsa; and c) that other nearby systems carry KJRH.<sup>17</sup>

7. Second, we consider "whether the television station provides coverage or other local service to such community."<sup>18</sup> Cable One states that KJRH's predicted Grade B contour encompasses the communities.<sup>19</sup> Cable One notes that the Commission has previously ruled that Grade B contour coverage is an important factor in determining that a station provides local service.<sup>20</sup> In addition, Cable One states that KJRH is geographically close to the communities – KJRH's transmitter is 70.1-77.2 miles distant and its city of license 76.1-82.3 miles distant.<sup>21</sup> Cable One maintains that these distances are well within the range in prior Commission decisions in which the television station was considered to be local to the communities at issue.<sup>22</sup> Cable One argues further that KJRH's programming serves the needs and interests of the communities.<sup>23</sup> Not only does it offer numerous local news, sports and community interest programs, but its programming is listed in the local newspaper and the local edition of *TV Guide*.<sup>24</sup> Cable One argues further that, given the geographic connection linking KJRH and the communities, there are numerous business and economic connections between Tulsa and the cable communities. For example, Cable One states that many residents of the communities regularly shop in or commute to Tulsa.<sup>25</sup>

8. KSNF argues that Cable One fails to establish that KJRH provides local service to the communities.<sup>26</sup> KSNF states that the subject communities are on the outer fringes of KJRH's predicted

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<sup>13</sup>*Id.*

<sup>14</sup>*Id.* at 4.

<sup>15</sup>KSNF Opposition at 10.

<sup>16</sup>*Id.*

<sup>17</sup>Reply at 3.

<sup>18</sup>47 U.S.C. § 534(h)(1)(C).

<sup>19</sup>Modification at Exhibit C.

<sup>20</sup>*Id.* at 5, citing *Harron Cablevision of Massachusetts d/b/a Harron Communications Corp.*, 18 FCC Rcd 16856, 16858 (2003).

<sup>21</sup>*Id.* at Exhibit D. Cable One states that there are also no geographic barriers between the station and the communities. *Id.* at Exhibit E.

<sup>22</sup>*Id.* at 6, citing *WRNN License Company, LLC*, 20 FCC Rcd 7904 (2005) (79.5-94.5 miles); *Bay Television, Inc.*, 13 FCC Rcd 1209 (1998) (71 miles).

<sup>23</sup>*Id.* at 7.

<sup>24</sup>*Id.* at Exhibits F, G, H and I.

<sup>25</sup>*Id.* at 10 and Exhibits K and L.

<sup>26</sup>KSNF Opposition at 11.

Grade B contour and a significant portion of Ottawa County is outside the Grade B contour entirely.<sup>27</sup> KSNF states that Cable One does not provide any specific transcripts of KJRH's programming, but instead provides website pages which only show occasional references to programming directed to the communities.<sup>28</sup> In addition, KSNF argues that Cable One is disingenuous to claim that only KJRH's programming, such as weather, is unique.<sup>29</sup> KSNF states that it has a very advanced weather radar system which provides life-saving information to its entire viewing area.<sup>30</sup> KSNF asserts that the only unique programming to which Cable One is referring to is KJRH's national NBC programming. KSNF maintains that KJRH is not significantly viewed in Ottawa County, despite Cable One's claim that it is a major presence in the County.<sup>31</sup> Finally, KSNF asserts that Cable One does not provide any evidence to support its claims of an economic connection between the communities and KJRH.<sup>32</sup> KOAM-TV states that, while the very outer edge of KJRH's predicted Grade B contour may cover the communities, they are not proximate to each other and have little in common with Tulsa as compared to the much closer economic center of Joplin.<sup>33</sup> Moreover, although Cable One indicates that many residents in the communities commute to Tulsa, Census data reveals that only 45 persons regularly commute to work in Tulsa from Ottawa County out of a total of 4,021 residents who work outside the county.<sup>34</sup> KOAM-TV argues that Cable One's programming showing is also deficient because information from KJRH's website is not evidence of broadcast coverage.<sup>35</sup> Indeed, KOAM-TV states that Cable One cited only two specific news stories broadcast by KJRH that reference the cable communities.<sup>36</sup> There is no evidence that KJRH covered other important stories relative to Ottawa County.<sup>37</sup> KOAM-TV, however, states that it provides significant local coverage of issues of concern in the communities.<sup>38</sup> Cable One argues in reply that the fact that the communities are within KJRH's Grade B contour is highly significant, particularly as the Commission has clearly held that "the local service requirement is satisfied if the station's Grade B contour covers the community."<sup>39</sup> While KSNF claims that the subject communities are on the "very outer fringes" of KJRH's Grade B contour, Cable One notes that, even if true, the Commission has frequently found that market modification is warranted even where the communities at

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<sup>27</sup>*Id.* at 11. KSNF states that even a more accurate Longley-Rice analysis confirms this. *See* Exhibit 7.

<sup>28</sup>*Id.* at 12-13.

<sup>29</sup>*Id.* at 13.

<sup>30</sup>*Id.* at 14.

<sup>31</sup>*Id.* at 14, citing Modification at 9.

<sup>32</sup>*Id.* at 15-16.

<sup>33</sup>KOAM-TV Opposition at 3 and Attachment 2.

<sup>34</sup>*Id.* at Attachment 3.

<sup>35</sup>*Id.* at 5.

<sup>36</sup>*Id.* at 6.

<sup>37</sup>*Id.*

<sup>38</sup>*Id.* at 8.

<sup>39</sup>Reply at 5, citing *TCI of Northern New Jersey, Inc.*, 12 FCC Rcd 891 (1997) (citing *Must Carry Order*, 8 FCC Rcd 2965, 2981 (1993)).

issue were on the edge (or slightly outside) the subject station's Grade B contour.<sup>40</sup> Moreover, Cable One states, it has demonstrated that KJRH and its transmitter are geographically close to the communities, there are no geographical obstacles and the station provides programming of local interest. While both KSNF and KOAM-TV challenge the distances between Cable One's communities and KJRH and cite cases where the Commission has denied requests with similar distances, Cable One argues that in those instances the station in question did not provide Grade B coverage, lacked historical carriage, and had no measurable ratings.<sup>41</sup> With regard to programming, Cable One asserts that evidence of programming specifically targeted to the communities is not essential to satisfying the local service factor when, as here, the station provides a Grade B signal to the communities.<sup>42</sup> In any event, Cable One maintains that its petition cited appropriate examples to demonstrate the provision of local programming.<sup>43</sup>

9. The third statutory factor we must consider is "whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community."<sup>44</sup> While this factor seems to be of minimum relevance in the instant proceeding, Cable One notes that many of the programs aired by KJRH are unique to the station and of marked interest to the communities.<sup>45</sup> Further, Cable One points out that KJRH is the only NBC affiliate currently carried by the system.<sup>46</sup>

10. The fourth statutory factor concerns "evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community."<sup>47</sup> Cable One states that according to a viewership study it commissioned, KJRH achieves significant viewership in the communities.<sup>48</sup> Both KSNF and KOAM-TV argue that Cable One's viewership data is not appropriate and does not support its contention that KJRH's DMA should be modified.<sup>49</sup> Cable One argues that KSNF and KOAM-TV fail to rebut the viewership evidence presented.<sup>50</sup> Cable One states that the viewership information was prepared by a reputable consulting firm using Nielsen data.<sup>51</sup> The fact that

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<sup>40</sup>*Id.* at 6, citing *DP Media of Martinsburg, Inc.*, 13 FCC Rcd 2123 (1998); *Diversified Broadcasting, Inc.*, 13 FCC Rcd 22331 (1998). Cable One states that, despite KSNF's contention, its petition does not relate to Ottawa County as a whole, but only a relatively small, unincorporated area adjacent to the community of Commerce. *Id.* at 6-7.

<sup>41</sup>*Id.* at 8 n.26.

<sup>42</sup>*Id.*

<sup>43</sup>*Id.* at 9.

<sup>44</sup>47 U.S.C. § 534(h)(1)(C).

<sup>45</sup>Modification at 8 and Exhibits G and H.

<sup>46</sup>*Id.* at 9.

<sup>47</sup>47 U.S.C. § 534(h)(1)(C).

<sup>48</sup>Modification at Exhibit J.

<sup>49</sup>KSNF Opposition at 15 and KOAM-TV Opposition at 9.

<sup>50</sup>Reply at 11.

<sup>51</sup>*Id.* Cable One states that it used Media Strategies to conduct its viewership studies.

the data does not prove that KJRH is significantly viewed is irrelevant as that is not a factor in market modification proceedings.<sup>52</sup>

11. Section 614(h)(1)(C) of the Communications Act authorizes the Commission to include or exclude particular communities from a television station's market for the purpose of ensuring that a television station is carried in the areas which it serves and which form its economic market.<sup>53</sup> Section 614(h)(1)(C)(i) specifically and unambiguously directs the Commission, in considering requests for market modification, to afford particular attention to the value of localism by taking four statutory factors into account.<sup>54</sup> In this matter, KJRH has a long history of carriage in the communities; provides Grade B coverage and local programming to the communities; and, according to Nielsen, has a viewership share of 2 percent of total households and a 24 percent net weekly circulation in Ottawa County where the system is located. For these reasons, we find that a grant of Cable One's market modification request is warranted.

## **B. Nonduplication Waiver**

12. Cable One has requested that the Commission waive the network nonduplication provisions of Section 76.92 of the rules to allow its cable subscribers to continue to receive uninterrupted carriage of KJRH because carriage of the system's in-market NBC affiliate, KSNF, has been discontinued due a retransmission consent dispute. Cable One states that KSNF has sought to invoke its network nonduplication protection against KJRH, despite the fact that it continues to withhold its consent for carriage.<sup>55</sup> In support of its request, Cable One contends that the program exclusivity rules should not restrict the receipt of signals that are available off-the-air anymore than they restrict stations that are considered to be significantly viewed.<sup>56</sup> Cable One argues that, because this situation arises from what is obviously an unintended anomaly in the Commission's rules and because the result contradicts the Commission's policy of assuring cable subscribers' ability to receive programming that is otherwise available off-the-air, a grant of the requested waiver is warranted.<sup>57</sup> In opposition, KSNF argues that Cable One's petition is actually a petition for rulemaking and its only basis for waiver is that KSNF is not currently carried on the cable system; a situation KSNF claims is of Cable One's own making.<sup>58</sup> KSNF urges the Bureau to deny Cable One's petition and order the system to immediately commence providing KSNF with the network nonduplication protection to which it is entitled.

13. We agree with KSNF and will deny Cable One's nonduplication waiver request. Cable One has not demonstrated any facts on this record to differentiate it from any other cable operator that fails to reach retransmission consent with a network affiliate. Moreover, the arguments raised by Cable One are matters that are more appropriately decided in the context of a rulemaking proceeding. The waiver request, if granted, would accord a unique status to KSNF that is not justified on the basis of this record and would essentially modify the underlying rule.

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<sup>52</sup>*Id.*

<sup>53</sup>47 U.S.C. § 534(h)(1)(C).

<sup>54</sup>47 U.S.C. § 534(h)(1)(C)(i).

<sup>55</sup>Petition at Exhibit 3.

<sup>56</sup>*Id.* at 6.

<sup>57</sup>*Id.* at 15.

<sup>58</sup>Opposition at 1-2.



### C. Show Cause

14. KSNF has argued that Cable One, for two months, has willfully and wrongly refused to provide KSNF with network nonduplication protection as required pursuant to Section 76.92 of the Commission's rules.<sup>59</sup> Cable One has apparently willfully violated the Commission's network nonduplication rules by failing to provide KSNF with network nonduplication protection against KJRH and we will in a separate proceeding determine whether a Notice of Apparent Liability against Cable One should be issued for its apparent violation. Cable One has argued that its apparent violation should be mitigated by the fact that it was required to maintain the *status quo* during the pendency of its market modification petition. Cable One is in error. The market modification process stays any action by a cable system with regard to a station's must carry status only. The pendency of a market modification petition does not stay a cable system's obligation to provide network nonduplication protection where required. In sum, it appears that Cable One impermissibly granted itself a waiver of the Commission's rules. Additionally, KSNF asked for an order to show cause ordering Cable One to comply with the network nonduplication requirements. We note, however, that as of September 21, 2005, Cable One has begun providing KSNF with the required protection. As a result, we need not issue an order to this effect.

### IV. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED**, pursuant to Section 614(h) of the Communications Act of 1934, as amended (47 U.S.C. §534), and Section 76.59 of the Commission's rules (47 C.F.R. § 76.59), that the captioned petition for special relief (CSR-6846-A), filed by Cable One, Inc. **IS GRANTED**.

16. **IT IS FURTHER ORDERED** that the petition for a waiver of the network nonduplication requirements (CSR-6711-N), filed by Cable One, Inc. **IS DENIED**.

17. **IT IS FURTHER ORDERED** that the order to show cause (CSC-395), filed by Nexstar Broadcasting, Inc. **IS DISMISSED**.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson  
Deputy Chief  
Media Bureau

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<sup>59</sup>Complaint at 1, citing 47 C.F.R. § 76.92.